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Supreme Court of the United States

OCTOBER TERM, 1957

No. 878

MRS. WOODROW SAPP, MRS. JAMES H. TYRE AND MRS. LEROY BECKHAM, SR., PETITIONERS,

versus

ATLANTIC COAST LINE RAILROAD COMPANY, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

HENRY HAMMER,
Columbia, S. C.,
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JURISDICTION

The judgment of the Court of Appeals was entered on November 1, 1957 (App. 22). Petition for rehearing (App. 23) was denied on December 24, 1957 (App. 42). The jurisdiction of this Court is invoked under the provisions of 28 U. S. C. 1254.

QUESTIONS PRESENTED

1. Does a federal appellate court have the power to review and weigh the evidence, and find the ultimate facts different than those found by the jury on the issue of an alleged particular of a railroad company's negligence where under the applicable substantive law of the state such particular of negligence, in the absence of some evidence to the contrary, is prima facie presumed, and no controverting evidence pertaining to such particular of negligence had been produced?

2. Apart from the statutory presumption, is it a question for a jury to decide whether or not a railroad company is negligent in slowly moving on a dark night a long freight train of low, black colored, non-illuminated flat cars over its tracks which cross at an obtuse angle a traveled highway blending in color with the freight cars in a foggy area, without giving the warning of placing lighted fusees at the unlighted crossing which it customarily gives on such occasions, or giving any other warning or signal of the presence of the train on the tracks to the traveling public whose view of the crossing is obstructed by an embankment, brush and trees, and whose vision is obscured by the bright neon lights on a building 150 feet beyond the crossing, where the railroad company was aware of such conditions creating a liklihood that motorists would collide with the passing freight train just as in fact did occur?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U. S. Constitution, Amendment VII:

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of common law."

Georgia Code Section 94-1108:

"In all actions against railroad companies for damages done to persons or property, proof of injury inflicted by the running of locomotives or cars of such companies shall be prima facie evidence of the want of reasonable skill and care on the part of the servants of the companies in reference to such injury."

Georgia Code Section 38-119:

"Where a party has evidence in his power and within his reach, by which he may repel a charge or claim against him, and omits to produce it, a presumption arises that the charge or claim is well founded; but this presumption may be rebutted."

STATEMENT

The instant cases, three in number and consolidated for trial and on appeal, were brought by petitioners, the mothers of three boys killed in a railroad crossing collision, against respondent, Atlantic Coast Line Railroad Company, for negligence in the operation of its train and maintenance of its railroad crossing proximately resulting in the collision between the automobile in which the intestates were riding and the 83rd car of a 92 car freight train of respondent while it was slowly moving over the crossing on a dark, foggy night without any lights or other warning to motorists of the presence of the train on the crossing,

although the respondent was aware of conditions which created a liklihood that motorists and its train would collide at the crossing just as in fact occurred. The deceased son of petitioner Mrs. Leroy Beckham, Sr., was driving the automobile and the sons of the other two petitioners were riding as passengers.

The jury returned verdicts of $34,000.00 in favor of petitioner Mrs. Woodrow Sapp, $34,000.00 in favor of petitioner Mrs. James H. Tyre and $40,000.00 in favor of petitioner Mrs. Leroy Beckham, Sr.

Upon appeal, the Court below reversed the judgments and remanded the cases to the District Court with directions to enter judgments for the respondent railroad company. Petition for rehearing (App. 23) was filed by the petitioners and denied by the Court below on December 24, 1957.

REASONS FOR GRANTING THE WRIT

1. **The decision herein is contrary to the applicable state law and violates the principle enunciated by this Court in** *Erie Railroad Co. v. Tompkins*, 304 U. S. 64: The decision in the Court below is in direct conflict with the holding by this Court in *Erie Railroad Co. v. Tompkins*, 304 U. S. 64, 78, that in a diversity case the federal courts are bound by the substantive law of the state as declared by the legislature or by the highest court of the state.

By the statutory law of Georgia, where the petitioners' sons met their untimely deaths, it is declared that in all actions against railroads for damages arising out of crossing collisions, proof of the happening of the event and the resulting injuries raises a prima facie presumption of negligence on the part of the railroad company, Georgia Code Section 94-1108. This presumption exists in favor of plaintiffs only as to railroads and does not apply against defendants in general.

The Georgia Court of Appeals in *Collier v. Pollard,* 60 Ga. App. 105, 2 S. E. (2d) 821, 823, has construed this statute to mean that "where damages are proved to have resulted by the operation of the cars of a railroad company, a presumption of negligence arises **as to each of the negligent acts charged in the petition,** and the plaintiff is entitled to recover the damages proved on such a prima facie case, unless the defendant shall carry the burden of showing that the damage was done by the consent of the injured person, or was caused by his negligence, or that the defendant was not guilty of the negligence charged."

And in *Atlantic Coast Line Railroad Co. v. Thomas,* 83 Ga. App. 477, 64 S. E. (2d) 301, the Georgia Court of Appeals stated, "In making out a prima facie case by evidence as to the various acts of alleged negligence he forces the railroad to produce **some** evidence **as to each alleged act of negligence** in order to avoid the effect of the prima facie case. When the railroad offers opposing evidence **as to each act of alleged negligence,** the statutory presumption immediately vanishes and plaintiff must go forward with the evidence if any more is needed to establish a preponderance of evidence."

It is also well settled law of Georgia that "where the plaintiff relies upon more than one act of negligence, it is not necessary that he establish all the acts relied upon in order to be able to recover." *Collier v. Pollard, supra.* And in this connection, the Georgia Court of Appeals, in applying the prima facie statute in *Collier v. Pollard, supra,* significantly stated: "In this case at least one act of negligence was not only not negatived by the plaintiffs' evidence but was proved, and a finding that there were others might or might not have been authorized."

The petitioners enumerated thirteen particulars of acts of negligence in the complaint (R. 13-19) designated by

letters (a) through (m). The only particular of negligence which was controverted was the allegation of paragraph (h) which alleged that the respondent railroad company was negligent in failing to erect a cross buck or "X" sign in accordance with the statute. Admittedly, the prima facie presumption of negligence as to this particular vanished in accordance with the Georgia law.

No controverting evidence was produced, however, as to the other alleged particulars of negligence, including particularly, *inter alia*, the allegations of paragraph (d) that the movement of the train over the crossing without giving warning to vehicular traffic was in violation of the railroad company's rules and regulations, and the allegations of paragraph (i) that the crossing was a dangerous one because of the prevailing conditions thereat; that the railroad company was aware of the conditions which created a liklihood that motorists would be injured by colliding with trains on the crossing; and that although in the past the railroad company had made reasonable provision against such liklihood and the public had come to rely upon such provision taken by the railroad to light up the crossing with fusees to warn them of the presence of freight cars on the tracks, no such provision was taken by the railroad on the night in question.

Notwithstanding the absence of controverting evidence on one or more of the particulars of negligence, the Court below, on the basis of the controverting evidence pertaining to the single particular of negligence of the railroad in failing to erect a cross buck sign, held that the prima facie evidence statute, Georgia Code Section 94-1108, did not create any presumption or "inference of negligence which warranted submitting the case to the jury." Clearly, such ruling was contrary to and violated the provisions of the Georgia prima facie evidence statute as declared by the legislature and construed by the highest court of the state.

The Court below also held that the Georgia prima facie statute did not apply in the instant case for the reason stated in its opinion that "appellees particularized various acts of negligence on the part of the railroad and having adduced some evidence in support thereof the case then stood as to burden of proof no differently from a case against a non-railroad". This ruling was in direct conflict with the Georgia decisions, all-of which hold that the prima facie statute applies notwithstanding the introduction of evidence in support, as distinguished from contradiction, of plaintiff's claim, *Collier v. Pollard,* 60 Ga. App. 105, 2 S. E. (2d) 821; *Fowler v. W. & A. Ry.*, 75 Ga. App. 156, 42 S. E. (2d) 499; *Gammage v. Atlanta and West Point Ry. Co.*, 97 Ga. 62, 25 S. E. 207; *Gay v. Sylvania Central Ry. Co.*, 79 Ga. App. 362, 53 S. E. (2d) 713.

Of course, the decision of the Court below against petitioner Mrs. Leroy Beckham, Sr., could not have been predicated upon contributory negligence of her son in the operation of the automobile. As was so aptly stated by the Georgia Court of Appeals in *Collier v. Pollard, supra,* "There being no evidence to show what precautions the deceased took before going on the crossing, or as to whether he discovered the negligence of the defendant in time to avoid it, or that he could have avoided it by the exercise of ordinary care, the Court should have submitted the question involved to a jury for determination", and "In the absence of evidence to the contrary, it is presumed that he complied with any duty that may have devolved upon him in that regard."

Moreover, under the Georgia law, "even if the negligence of the injured person contributed in some degree of negligence less than that of the railroad, a recovery is still authorized in an amount diminished in proportion to such contributory negligence." *Collier v. Pollard, supra.*

For the same reasons applicable to the petitioner Mrs. Beckham, a directed verdict against the other petitioners could not have been authorized. In addition, since the intestates of the other two petitioners were passengers in the automobile and there was no evidence of joint enterprise, the negligence, if any, of the driver of the automobile could not be imputed to the passengers, *Atlantic Greyhound Corporation v. Loudermilk*, 110 F. (2d) 596, nor can the concurring negligence, if any, of the driver of the automobile relieve the railroad company from liability for an injury resulting from the joint and concurrent negligence of the railroad and the driver of the automobile, *A. C. L. v. Freeman*, 193, F. (2d) 217, 219.

Thus, the action of the Court below in not applying the substantive law of the state, which includes matters pertaining to presumptions and burden of proof, *Cities Service Oil v. Dunlap*, 308 U. S. 208, clearly violated the doctrine of *Erie Railroad v. Tompkins*, 304 U. S. 64.

2. **The action of the Court below constituted an invasion of the province of the jury contrary to the Seventh Amendment to the United States Constitution:** The decision of the Court below is concluding that the respondent railroad company was not negligent deprives the petitioners of their right to trial by jury under the Seventh Amendment to the United States Constitution. In its undue invasion of petitioners' constitutional rights, the decision of the Court below is in conflict with numerous decisions of this Court establishing the jury as the sole arbiter of disputed issues of fact.

That an appellate court is confined to an examination of the record merely to determine whether there was sufficient evidence to warrant submitting the issue to the jury in cases where the evidence is conflicting and subject to different inferences and conclusions, has long been the es-

tablished rule of judicial review; and the deprivation of a constitutional right by the violation of this fundamental rule has many times been made the basis for granting writs of certiorari by this Court. *Weade v. Dickman*, 337 U. S. 801; *Fountain v. Wilson*, 336 U. S. 681; *Rogers v. Missouri Pacific Railroad Co.*, 352 U. S. 500; *Smalls v. Atlantic Coast Line Railroad Co.*, 348 U. S. 946; *Neese v. Southern Railway Co.*, 348 U. S. 950; *Moore v. Chesapeake and Ohio Railroad Co.*, 340 U. S. 573; *Carter v. Atlanta and St. Andrews Bay R. R. Co.*, 338 U. S. 430; *Wilkerson v. McCarty*, 336 U. S. 53; *Myers v. Reading*, 331 U. S. 447; *Ellis v. Union Pacific R. R. Co.*, 329 U. S. 649; *Lavender v. Kurn*, 327 U. S. 645; *Jesionowski v. Boston and Main R. R. Company*, 329 U. S. 452; *Tenant v. Peoria and Perkin Union R. R. Co.*, 321 U. S. 29; *Sartor v. Arkansas Natural Gas Corp.*, 321 U. S. 620; *Bailey v. Central Vermont R. R. Co.*, 319 U. S. 350; *Tiller v. Atlantic Coast Line R. R. Co.*, 318 U. S. 54.

Apart from the prima facie presumption of negligence under the Georgia statute, the evidence of record shows, as correctly stated by the Court below, that petitioners "particularized various acts of negligence on the part of the railroad and • • • adduced some evidence in support thereof." The evidence adduced showed that "it was very foggy on the road that night", "the road was wet from the fog", "it was just foggy all over" including the railroad crossing, and it was "real, real bad that night". (R. 177); that immediately after the noise of the collision, one of the witnesses in a building approximately 150 feet from the crossing looked out of the window, but because of darkness, fog, and the nature and color of the feight cars blending with the black pavement (R. 105), could see only the sparks on the crossing caused by the car which was struck scraping along the tracks, but could not see any of the cars going over the crossing (R. 143, 144); that the crossing

was not permanently lighted, did not have any gates or automatic blinkers and there was no flagman at the crossing to warn motorists of the presence on the tracks of the train invisible or obscured to mortorists because of the surrounding conditions (R. 101); that the railroad company had in the past lighted up the crossing when moving its freight trains over it at night by throwing out fusees (R. 104) because of which, motorists had a right to rely that such warning would be given them of the presence of the freight cars on the tracks; that the view of the crossing looking toward the direction the automobile was travelling, was obscured, as stated in the opinion of the Court below, "by an embankment, deep underbrush, and trees"; that approximately 150 feet beyond the crossing, facing toward the direction of the approaching automobile in which intestates were riding, there was a building with large bright neon lights (R. 112) tending to further obscure the vision of motorists approaching the crossing; that despite the existence of such conditions, no fusees were used to light up the crossing and warn motorists of the presence of the unlighted freight cars on the crossing on the night in question (R. 104); and, that no official of the company was produced to repel the charge against it that a rule or regulation had been promulgated by the company, which had been violated, and no one was produced as a witness to repel the other charges against it, although its train crew was present in court and the Georgia Code, Section 38-119 provides that under such circumstances a rebutable presumption arises that the charges are well founded.

From the foregoing evidence of record, it is obvious that the crossing was a dangerous place for motorists passing over it and the presence of trains on the tracks would not be readily visible to motorists approaching the crossing, particularly under the conditions existing on the night in question and because of the fact that on previous occasions

it had been the practice for the railroad to light the crossing with fusees to warn motorists of the presence of freight cars on the track—a warning signal upon which motorists had the right to rely. The evidence is also clear that the respondent railroad company was aware of the foregoing circumstances or conditions. Under the foregoing facts, despite conflicting testimony as to some of the details, whether the railroad was negligent in discharging its duty to the public to maintain a visible crossing and provide proper warnings of the presence of trains on the crossing for the safety of motorists is a question to be determined by a jury under both the State and Federal law, *Atlanta and St. Andrews Bay R. R. Co. v. Church* (C. A. 5), 212 F. (2d) 688; *Atlantic Coast Line R. R. Co. v. Kammerer* (C. A. 5), 205 F. (2d) 525. The Georgia state court decisions holding that such facts create jury issues are collected in footnote 2 of the *Atlantic Coast Line R. R. Co. v. Kammerer case,* at page 119. The questions of whether the danger to motorists was foreseeable and whether the railroad had a duty to make reasonable provisions against it, were certainly for the jury. This Court so held in cases factually similar, *Smalls v. Atlantic Coast Line Railroad Company,* 350 U. S. 439; *Lillie v. Thompson,* 332 U. S. 459.

Therefore, it is respectfully submitted that the Court below, in substituting its view of the case for the jury, invaded the province of the jury, contrary to the rights of petitioners under the Seventh Amendment to the United States Constitution.

CONCLUSION

For the foregoing reasons this Petition for a Writ of Certiorari should be granted, the judgment of the Court below should be reversed, and the judgments of the District Court should be affirmed and reinstated.

Respectfully submitted,

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APPENDIX

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JUDGMENT OF DISTRICT COURT OVERRULING MOTION FOR NEW TRIAL AND FOR JUDGMENT NOTWITHSTANDING THE VERDICT

Filed August 15, 1956

Defendant's motion for judgment notwithstanding the verdict or in the alternative for a new trial in these three consolidated cases having been argued on August 6, 1956, same is hereby overruled and denied upon the following grounds, to-wit:

1. Defendant's principal argument is that there was no evidence of negligence on the part of defendant. There was evidence, however, that defendant had recognized the crossing involved in this case as a particularly hazardous one on foggy nights by throwing out lighted fusees on such nights to warn vehicular traffic of the presence of railway cars on the tracks. There was evidence that on the night in question the crossing was engulfed in fog and the fusees were either not thrown out, or if they were, they were not burning at the time of the accident.

Although the defendant summoned to Court, and swore, all the members of the train crew, it did not use any of them as witnesses to contradict plaintiffs' evidence about the fusees, or for any other purpose. Defendant closed without offering any evidence.

Under Georgia law, "Where a party has evidence in his power and within his reach, by which he may repel a charge or claim against him, and omits to produce it—a presumption arises that the charge or claim is well founded; but this presumption may be rebutted." Ga. Code 38-119.

In the Fifth Circuit case of *Atlanta & St. Andrews Railway Co. v. Church*, 212 F. (2d) 688, 691, it was held that recovery may not be denied as a matter of law in a case in which, though the railroad thought it necessary to put down lighted fusees, it either put them out ineffectively or they went out before the accident.

2. Defendant contends that this was not a case in which Section 94-1108 of the Code of Georgia should have been given in charge to the jury. That section provides that "In

all actions against railroad companies for damages done to persons or property, proof of injury inflicted by the running of locomotives or cars of such companies shall be prima facie evidence of the want of reasonable skill and care on the part of the servants of the companies in reference to such injuries."

This is a rebuttable presumption and Georgia Courts have uniformly held that it disappears immediately and the railroad goes forward with its proof of due care. When that occurs, the section should not be charged. *Atlantic Coast Line R. R. Co. v. Thomas,* 83 Ga. App. 477, 483, 64 S. E. (2d) 301.

But in the case at bar, the defendant railroad company, although having the witnesses at hand with which to disprove plaintiffs' contentions, if they were not true, with respect to the foggy night and the failure to put down fusees of sufficient burning length to last until the long string of cars passed the crossing, it did not choose to go forward with that proof, thus raising the presumption that the charge was well founded.

Defendant's contention is that the statutory prima facie rule was rebutted by plaintiffs' own witnesses, making it unnecessary for defendant to offer testimony in order to avoid the impact of the statute. But the contention is not borne out by the evidence. All of the evidence on the subject of fusees was to the effect that they were not burning at the time of the accident and that the night was foggy.

No other grounds of error were argued by the defendant upon the hearing.

In Chambers at Brunswick, Georgia, this August 14, 1956.

F. M. SCARLETT,
United States Judge.

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 16425

ATLANTIC COAST LINE RAILROAD COMPANY,
APPELLANT,

versus

MRS. WOODROW SAPP, MRS. JAMES H. TYRE AND MRS. LEROY BECKHAM, SR., APPELLEES

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA

(November 1, 1957.)

Before HUTCHESON, Chief Judge, and BORAH and CAMERON, Circuit Judges.

BORAH, Circuit Judge: These are appeals from adverse judgments entered upon jury verdicts in three separate actions brought by appellees to recover damages for the wrongful deaths of their respective sons, Leonard Holmes, Perman Tyre, and Leroy Beckham, Jr., which occurred when a 1950 Oldsmobile automobile in which they were riding was driven into a train of freight cars moving across Pyles Marsh Crossing between Brunswick and Jesup, Georgia.

In the complaints it was alleged, among other things, that defendant was guilty of wilful and wanton negligence in that it failed to provide a statutory cross arm sign or other observable sign or warning of the existence of the crossing, and did block the highway without throwing out lighted fusees in conformity with its alleged practice to so warn vehicular traffic of the presence of cars upon the crossing. Defendant denied each of these allegations of negligence and affirmatively pleaded that the negligence of the driver of the automobile and the two passengers in operat-

ing the vehicle at an excessive rate of speed and in failing to exercise ordinary care for their own safety was the sole and proximate cause of the collision.

The three cases were consolidated by the court below and a trial by jury was had. At the conclusion of plaintiffs' evidence, defendant moved for and was denied a directed verdict in each case. Whereupon, and after defendant elected not to produce its evidence, the court submitted the action to the jury. Upon return of the jury's verdicts for plaintiffs, defendant unsuccessfully moved for judgments *n. o. v.* or in the alternative for a new trial, and these appeals followed. The sole question confronting us for decision is whether the District Court erred in denying these motions.

The accident occurred shortly after midnight on the morning of October 26, 1951. At that time, and as they approached the crossing, the three minors, Holmes, Tyre and Beckham, all born and reared in Brunswick, were traveling in a northeasterly direction on U. S. Highway 25 from Brunswick toward Jesup, Georgia. Earlier in the evening, Beckham and Tyre in company with two young girls had driven out this highway to a point beyond Pyles Marsh Crossing and had returned over the same route. One of the girls who on this occasion had driven the automobile for a short period testified that it was in good running condition and that the brakes and headlights were functioning properly. Both girls testified that they encountered some fog on the road that night which they described variously as very foggy, spotty, or in patches, but one of these witnesses was not asked and the other did not recollect whether the weather conditions which they described existed at the crossing in question.

The defendant's track at Pyles Marsh Crossing runs in an east-west direction across Highway 25, and it was admitted by the railroad that it maintained no automatic signals or other warning lights at the crossing, and that no employee of defendant was stationed there to flag or otherwise warn motorists of the presence of defendant's train. However, the evidence, contrary to the allegations of the complaints, does show that an "X" or cross arm sign was

located on the Brunswick side of the crossing in conformity with applicable law. It also affirmatively appears that a motorist traveling toward Jesup on Highway 25 would, upon approaching the crossing, have his view from the east obstructed by an embankment, deep underbrush, and trees. But it is equally clear from the testimony that these physical conditions which existed on defendant's right of way would not prevent a motorist's seeing a moving freight train on the crossing directly in front of him and across the highway he was traveling.

The witness Robert W. Rozier, who operated a restaurant which was situated some 150 feet from the intersection of defendant's tracks and Highway 25, testified that he heard the train's warning whistle blow as it approached the crossing from the east. The witness stated that he was then seated in a lighted restaurant dining room looking through a plate glass window and although it was foggy outside he saw not only the approaching engine headlight, but also several of the dark colored freight cars—some high and some low or "gondola" types—as they passed over the crossing. He stated further that he had on prior occasions seen trains pass over the crossing, had seen them throw out fusees, but that he did not see a lighted fusee dropped from the engine on the night in question.

No eyewitness saw the automobile immediately before or when it crashed into the eighty-third car of defendant's ninety-two car freight train, but both Rozier and his twelve year old nephew, Robert Moody, heard the crash, saw sparks fly in the vicinity of the crossing, and a few moments later heard a loud explosion which illuminated the sky some fifty or sixty feet in the air. Following the explosion the train came to a stop. At that time the gondola car which had been struck and derailed by the automobile was a quarter of a mile west of the highway and the automobile was so enmeshed with the railroad car that it was necessary to use a torch to burn away some of the metal in order to remove two of the bodies from the wreckage. Rozier testified that there was some fog around the freight cars after the collision. But the undertaker who came to remove the bodies stated that he did not experience any difficulty because of

the weather in driving to the scene of the accident, and his testimony was corroborated by Moody who swore that the patches or streaks of fog which he and his aunt encountered on the road back to Brunswick after the accident was not so dense or hazardous that the automobile in which they rode had to be driven below normal speed.

On this appeal, appellant contends that plaintiffs' evidence wholly failed to show that the railroad company was guilty of any act of negligence the result of which caused the death of the son of either of the plaintiffs, and that under the facts the *prima facie* presumption statute, Georgia Code § 94-1108,[1] did not create any inference of negligence which warranted submitting the case to the jury. We agree.

We take it to be fundamental that when a railroad is permitted to be constructed, its operator may lawfully cross roads and streets with its trains just as members of the public may cross the tracks with their vehicles. *Driskell v. Powell*, 5 Cir., 67 F. (2d) 484. And it is the common sense rule in Georgia as elsewhere that no warning need be given to a person of prudence of an object plainly visible within the range of the statutory headlight requirements. *Atlantic Coast Line Railroad Company v. Kammerer*, 5 Cir., 239 F. (2d) 115, 117. In the instant case the only fact relied on by appellees to impose the additional duty on the part of the railroad to provide a special warning was the alleged presence of fog at the crossing. And to establish liability it was necessary for appellees to prove that the fog was of such density that it impaired the automobile driver's visibility to such an extent that he in the exercise of ordinary care for his own safety could not have seen the train on the crossing in sufficient time to avoid striking it. This they wholly failed to do. Rozier was the only witness who was conversant with the situation as it existed at or about the time of the collision and he from his position in a lighted room was able to see the moving cars go over the crossing at least 150 feet

[1] "In all actions against railroad companies for damages done to persons or property, proof of injury inflicted by the running of locomotives or cars of such companies shall be prima facie evidence of the want of reasonable skill and care on the part of the servants of the companies in reference to such injury." Ga. Code § 94-1108.

away without the help of any light shining before him as the occupants of the automobile doubtless had, or should have. Thus there was no evidence, either direct or circumstantial, which showed to what extent the visibility of the driver was impaired, which left the question of liability one of mere conjecture. *Atlantic Coast Line Railroad Company v. Marshall*, 89 Ga. App. 740, 81 S. E. (2d) 228.

With reference to the railroad's alleged custom of putting out fusees to warn motorists that a train was passing over the crossing, the one witness who testified that he had previously seen fusees burning at the crossing did not explain the conditions existing on those prior occasions. From all that appears the fusees may have been placed there while the train was standing on the crossing, during switching operations, or as a warning to following trains. But be this as it may, we are of the clear opinion that the evidence at the trial does not bring this case within the decision of this Court in the Florida case of *Atlanta and St. Andrews Railway Company v. Church*, 212 F. (2d) 688, 691, as appellees stoutly contend. Nor does Georgia Code § 38-119 supply the deficiency in appellees' proof. The statute provides that:

> "Where a party has evidence in his power and within his reach, by which he may repel a charge or claim against him, and omits to produce it, a presumption arises that the charge or claim is well founded; but this presumption may be rebutted."

We think it plain from the Georgia decisions that the statute has no applicability here for the reason that such an inference cannot be drawn where the railroad crew was accounted for and produced in court where they could have been examined by appellees with reference to the alleged custom to protect this crossing with fusees. *Davis & Hatcher v. The Central Railroad*, 75 Ga. 645.

Likewise, and in agreement with appellant, we are of the opinion that the Georgia *prima facie* presumption statute, Georgia Code § 94-1108, does not aid appellees in making out a case. While it is true that a plaintiff may make out a *prima facie case* under this section by showing injury

by the running of a train and contending himself with the aid of the presumptive statute as to negligence on the part of the railroad through its servants,[2] that situation is not here presented. In the case at bar appellees particularized various facts of negligence on the part of the railroad and having adduced some evidence in support thereof the case then stood as to burden of proof no differently from a case against a non-railroad defendant. The burden rested upon appellees to establish their right to recover by a preponderance of the evidence. Conceding, as we must and do, the truth of all of the proof made by appellees, no imputation of negligence was cast upon the railroad for the statute only supplies an inference of liability "in the absence of other evidence contradicting such inference." *Mobile, J. & K. C. R. R. v. Turnipseed*, 219 U. S. 35, 43. Here, the inference of the railroad's negligence was at an end when the evidence introduced by appellees rebutted the only charge of negligence upon which they relied.

Consequently, the matter was not for submission to the jury but should have been disposed of by the court by an instructed verdict. It was error to refuse to direct a verdict for appellant and because of that error, the judgment of the District Court is reversed and judgment is here rendered for appellant.

REVERSED AND RENDERED.

JUDGMENT

Extract from the Minutes of November 1, 1957

ATLANTIC COAST LINE RAILROAD COMPANY,

No. 16425 *versus*

MRS. WOODROW SAPP, MRS. JAMES H. TYRE, and MRS. LEROY BECKHAM, SR.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Georgia, and was argued by counsel:

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said Dis-

[2] See *Atlantic Coast Line Railroad Company v. Thomas*, 83 Ga. App. 477, 64 S. E. (2d) 301, 318.

trict Court in this cause be, and the same is hereby, reversed and judgment is here rendered for appellant, Atlantic Coast Line Railroad Company;

It is further ordered and adjudged that the appellees, Mrs. Woodrow Sapp, Mrs. James H. Tyre and Mrs. Leroy Beckham, Sr., be condemned, *in solido*, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

PETITION FOR REHEARING AND BRIEF IN SUPPORT

To The Honorable, The Judges of the United States Circuit Court of Appeals for the Fifth Circuit:

Come now, Appellees in the above-entitled cause and respectfully ask for a rehearing in these three cases upon the following grounds, to wit:

Appellees, with the very greatest respect, but, also, with the most sincere conviction as to the soundness of their position, contend that this Court in reversing and rendering judgment against them, overlooked the following facts, to wit:

1. The evidence in these cases presented an issue for the jury. Trial by jury is guaranteed under the Seventh Amndment to the Constitution of the United States. It was error for this Court to usurp the province of the jury in these cases.

The Court states (p. 8 of Opinion) that Appellees adduced some evidence in support of the various acts of negligence "particularized" by Appellees against Appellant.

Appellant put up no evidence whatever.

In this situation, this Court overlooked the fact that it was for the jury to decide whether or not Appellees' evidence was sufficient to carry the burden of proof.

2. The Court overlooked the fact that even without the benefit of the *prima facie* statute, Appellees' evidence was sufficient to carry these cases to the jury under the law of Georgia as interpreted by this Court and by Georgia Courts in numerous decisions.

3. The Court overlooked the fact that under Georgia law the testimony adduced by Appellees with respect to the inherently dangerous nature of this crossing, with respect to weather conditions existing on the night of the accident, and with respect to the practical invisibility at night of the particular type of freight cars making up the train in question, imposed upon Appellant the duty of giving some warning to motorists of the presence of the train at this dangerous crossing, in addition to that afforded by the train itself. See *A. C. L. v. Kammerer*, 239 F. (2d) 115 and the numerous cases cited therein.

4. In holding that the Georgia *prima facie* rule did not apply because "the evidence introduced by Appellees rebutted the only charge of negligence upon which they relied," the Court overlooked the fact that the complaints set out 13 charges of negligence against Appellant (R. 14), and that only one of these charges (the one with respect to the X sign) was rebutted by Appellees' evidence.

The Court also overlooked the fact that there was no evidence whatever which rebutted the principal charge of negligence upon which Appellees relied, namely, that because of the inherently dangerous nature of this crossing at which many accidents had occurred and because of the practical invisibility at night of the particular type of cars which were moved over this track, the railroad, instead of installing expensive blinker lights at this rarely used crossing, had adopted the expedient of having the engineer and the fireman throw out fuses on the highway on each side of the crossing at night to warn motorists of the presence of the train across the highway; that the traveling public had become accustomed to rely upon these fuses and were entitled to rely upon them; that fuses were not thrown out on the night in question or, if they were, they had burned out before the 83rd car reached the crossing, and that this negligence on the part on the railroad was the approximate cause of the collision.

All of the evidence introduced tended to support this principal ground of negligence relied upon by Appellees and none of the evidence introduced rebutted it in any way.

5. This Court, in holding that the *prima facie* statute did not apply because Appellees "particularized" the grounds of negligence in their complaints and because some evidence was introduced in support of some of the grounds of negligence, overlooked the fact that no such interpretation as this has ever been put upon this statute, to our knowledge, either by Georgia Courts or by any other Court.

6. In holding that it was encumbent upon appellees to prove directly that it was impossible for the occupants of the automobile to see the train at the time the automobile approached the crossing, this Court overlooked the fact that all of the occupants of the automobile were instantly killed at the crossing and, therefore, could not appear as witnesses. On the other hand, the occupants of the train were not injured. That is the usual situation in cases of this kind and that is the reason for the Georgia *prima facie* rule. Ga. Code 94-118.

7. The Court overlooked the fact that the only persons in life, who could testify as to visibility down the highway being travelled by the automobile at the time the train reached the crossing, were the members of the train crew, whose evidence was not produced by the railroad, as required by Georgia law. Ga. Code 38-119.

8. In referring to the testimony of the witness Rozier as proof that the driver of the automobile could have seen the train at a distance of 150 feet, the Court overlooked the following facts:

(a) Rozier was sitting off the highway and on the opposite side of the crossing from the automobile.

(b) He had the benefit of a very bright neon light burning over the building in which he was sitting; whereas this light shone in the eyes of the occupants of the car as they approached the crossing.

(c) Even with the aid of the light, Rozier, who had heard the train whistle and was looking for it, could not see the train plainly.

9. In giving probative value to the testimony of the undertaker about visibility at the crossing when he arrived there some time after the accident, the court overlooked the fact that the crossing was lighted up by that time when the bodies and wreckage were being removed from the crossing; also, the fact that the fog was spotty, being very dense at some times and places and not so dense at others, as testified to by all the witnesses. These observations apply also to the references by the Court to the testimony of the witnesses Moody, Doran and Shell, relating to the fog.

10. In holding (p. 5 of Opinion) "that no warning need be given to a person of prudence of an object plainly visible within the range of the statutory headlight requirements" and (p. 6) that "to establish liability it was necessary for appellees to prove that the fog was of such density that it impaired the automobile driver's visibility to such an extent that he in the exercise of ordinary care for his own safety could not have seen the train on the crossing in sufficient time to avoid striking it", the Court overlooked the following facts:

(a) The most recent decisions by this Court and by the Georgia courts are precisely to the contrary of the above quoted holdings in the cases *sub judice*.

(b) Each of the three complaints alleged that the railroad was negligent in not giving additional warning because of the invisibility of the train on the crossing to motorists approaching the crossing from the south, at the time of the collision.

Not one single witness testified as to the visibility of the train to motorists approaching from the south either at the time, or near the time, of the collision.

Visibility from the north was an entirely different thing than visibility to motorists from the south, because of the large neon sign.

This ground of negligence was therefore not negatived by any witness and it was encumbent upon the railroad under Georgia law to come forward with its evidence in order to avoid the impact of the prima facie rule.

11. In holding that appellees lost the benefit of the *prima facie* rule by "particularizing" various acts of negligence on the part of the railroad company "and having adduced some evidence in support thereof, the case then stood as to burden of proof no differently from a case against a non-railroad defendant", this Court overlooked the fact that under the well known *Erie v. Tompkins* rule, the Court is bound by the interpretation of Georgia statutes made by Georgia courts. No Georgia court, to our knowledge, has ever given this interpretation to the statute embodied in Georgia Code Section 94-1108.

On the contrary, Georgia courts have held, without exception, to our knowledge, that the statute requires the railroad to come forward with some evidence to rebut each act of negligence "particularized" by the plaintiff.

To hold that because the plaintiff adduces some evidence in support of some of the grounds of negligence "particularized", he thereby forfeits the benefits of those grounds and as to every other group of negligence charged, is simply new law, we most respectfully submit, insofar as Georgia is concerned.

No Georgia court has ever so held, to our knowledge, and the Court cites no authority, Georgia or otherwise, for its holding.

To the best of our knowledge, the applicant railroad has taken no such position in the case *sub judice*.

12. In holding (Opinion, p. 8) that "the inference of the railroad's negligence was at an end when the evidence introduced by appellees rebutted the **only** charge of negligence upon which they relied", this Court inadvertently overlooked the following facts:

(a) Appellees relied upon **every** act of negligence set out in the complaints, as amended.

(b) The final enumeration of the grounds of negligence relied upon by appellees is to be found on pages 14, 15, 16, 17, 18 and 19 of the record. Amendment filed March 2, 1956.

Thirteen grounds of negligence were set out in this amendment.

The only one of these thirteen grounds of negligence which was "negatived" by appellees' evidence was ground (h) with respect to the "X" sign.

The principal grounds of negligence relied upon by appellees are to be found in sub-paragraphs (i), (j), (k), (l) and (m) (R. pp. 16, 17, 18, 19).

No evidence was adduced by the railroad to refute any of these grounds of negligence and none of them was negatived by any evidence of Appellees.

In the light of these indisputable facts, we ask, with the utmost respect, how can this Court say that Appellees relied upon only one charge of negligence and that it was rebutted by Appellees' evidence?

13. This Court, in discrediting the testimony of the witness Rozier (Opinion, p. 6) with respect to the custom and rule of the railroad to throw fuses on the highway at this particular crossing to warn motorists when the crossing was occupied by a train, overlooked the following facts:

(a) The Court, in holding that the fuses seen by Rozier may have been put out as a warning to "following" trains, overlooked the fact that common sense dictates that fuses thrown out for this purpose **would not be thrown on a public highway.**

(b) The Court, in holding that the fuses seen by Rozier may have been used in "switching" operations overlooked the fact that the pictures introduced in evidence show that the railroad at this point is a single track upon which it would have been impossible to carry out "switching" operations.

(c) The Court, in holding that the fuses seen by Rozier may have been put out by "standing" trains, overlooked the fact that under this Court's own very recent (4/12/57) decision in the *Watkins case* (243 Fed. (2d) 171) the railroad's duty with respect to moving trains is the same as with respect to standing trains.

(d) The Court overlooked the fact that under our law it is for the jury, and not the Court, to evaluate testimony of this kind.

(e) The Court overlooked the fact that it would have been a very simple matter for the railroad to have produced evidence as to what its purpose was in throwing fuses on the highway at this crossing, instead of leaving the matter to conjecture by the jury and by this Court. That the railroad's failure to do so should be condoned by this Court, instead of condemned, is one of the several mysteries in the Court's decision in these cases.

14. One of the charges of negligence made by the Appellees in these cases (R. 16 sub-paragraph i) was that because of the notoriously dangerous nature of this crossing at night, in any and all conditions of weather, the railroad had promulgated a rule requiring its train crews to throw fuses upon the highway; that motorists had come to rely upon these fuses to warn them when the highway was blocked by a train at night; that the crew failed to throw out a fuse on the night in question or that if they did so the fuse was not burning when the 83rd car crossed the highway.

It is elementary that violation of a company safety rule is evidence of negligence.

It is also elementary, and common sense, that when a railroad decides that a crossing is so dangerous as to require gates, blinker lights, fuses or the like; then installs one or more of these devices; then the device fails to operate, after motorists have come to depend upon it, and injury results, the railroad is liable, even though it may not have been liable in a given case if it had not lulled the motorist into reliance upon the safety device.

In holding in these cases that Appellees' evidence negatived every charge of negligence, this Court completely overlooked this charge of negligence.

Knowing that the sworn testimony of the train crew at the Coroner's inquest sustained this charge of negligence, Appellees did not prepare to prove it conclusively

by their own witnesses, since they knew that under Georgia law the railroad would have to put in the evidence of the members of the train crew.

The railroad took a chance and did not do so, because it knew that the verdicts would be much larger if it did.

We respectfully submit that this Court, in its impartial administration of justice should not reward the railroad for its strategy by giving it judgment.

15. This Court, in holding that these cases should be reversed and judgment rendered for defendant in spite of the jury verdict, overlooked the fact that this Court itself states (Opinion, p. 8) that Appellees "adduced some evidence in support" of the various acts of negligence Appellees "particularized".

In other words, this Court holds that although Appellees adduced some evidence in support of their charges of negligence and although defendant introduced no evidence whatever as to negligence by decedants, or as to care by defendant, nevertheless, justice under law requires that judgment be rendered for the railroad.

We respectfully submit that this Court momentarily and inadvertently confused the respective provinces of courts and juries under Anglo-Saxon jurisprudence.

16. In holding that Georgia Code Section 38-119 does not apply to the failure of the railroad to put in the evidence of the train crew because the railroad subpoenaed the members of the train crew and they appeared in court on the day the case was called and could have been sworn as witnesses by Appellees, the Court overlooked the following facts:

(a) This Code Section requires that the EVIDENCE must be produced.

(b) Having called these witnesses and sworn them on the first day of trial as potential witnesses for the defendant, plaintiffs had the right to assume, particularly in view of the *prima facie* statute, that their evidence would be introduced. It was not until after plaintiffs had closed their case that the railroad announced that it would offer no testimony. It was then too late for plaintiffs to call them as

their own witnesses, even if they thought it necessary to do so.

(c) In important cases of this kind involving the death of three young men, the railroad should be required to put in evidence of the train crew and this Court should certainly do no more than remand the cases for a new trial to determine what the evidence of the train crew is with respect to the grounds of negligence alleged against appellant.

WHEREFORE, for the reason stated, Petitions respectfully urge that the decision of the Court be revoked and the judgment below affirmed or, in the alternate, that a rehearing be granted Petitioners.

Respectfully submitted,

E. WAY HIGHSMITH,
Brunswick, Georgia,
J. P. MOZINGO III,
Darlington, South Carolina,
J. H. HIGHSMITH,
Baxley, Georgia,
W. L. McGOVERN,
Washington, D. C.,
Attorneys for Petitioners.

We, the undersigned, attorneys for Appellees in the above-stated case, hereby certify that the foregoing petition for rehearing is not interposed for delay, and that in our judgment it is well founded and should be granted by this Honorable Court. This November 29, 1957.

E. WAY HIGHSMITH,
J. P. MOZINGO III,
J. H. HIGHSMITH,
W. L. McGOVERN.

BRIEF IN SUPPORT OF PETITION FOR REHEARING

Division I. As to All Three Cases
Division II. As to Guest Cases Alone

DIVISION I

The decision of the Court in these cases is so startling in nature that we felt in duty bound, both to our clients and to the Court, to file a petition for rehearing.

The decision of the Court is based upon a statement of fact for which there is no support whatever in the record and upon a proposition of law which is unheard of in Georgia and for which Appellant does not even contend.

The Court states (Op. 8):

> "Here, the inference of the railroad's negligence was at an end when the evidence introduced by Appellees rebutted the only charge of negligence upon which they relied."

We challenge Appellant to point to one shred of evidence in the record which negatives Appellees' charge that the railroad had adopted a rule to protect this crossing at night with fusees and that this rule was violated on the night of the accident.

This Court holds (Op. 7) that the Georgia *prima facie* statute (94-1108) does not apply in the case at bar because "Appellees particularized various acts of negligence on the part of the railroad and having adduced some evidence in support thereof the case then stood as to burden of proof no differently from a case against a non-railroad defendant."

We challenge Appellant to cite a single decision so holding, and to show why the numerous Georgia decisions holding precisely to the contrary, three or four of which are cited in Appellant's own brief, should not be followed in the cases at bar.

There is simply no basis in fact or in law for this Court's holding on these two controlling points in the cases at bar, and if this Honorable Court will but read the Georgia cases and the portions of the record hereinafter cited,

we are confident that it will change its decision and affirm these cases.

1. Did Appellees rely upon only one charge of negligence and was that one charge negatived by Appellees' own evidence?

The record (p. 14) shows that each Appellee set out thirteen charges of negligence in her complaint as finally amended. The only one which was negatived by the evidence was the relatively unimportant one about the "X" sign.

These suits were brought and prosecuted primarily because the railroad's warning device failed on the night of Oct. 25, 1951. This Court held outright in the case of *Atlantic and St. Andrews Bay Railroad Co. v. Church*, 212 F. (2d) 688, that the failure of an identical type device (fusees) made a case for the jury, even **though the record in the Church case shows that plaintiff skidded 120 feet before running into the train.** This Court said in the *Church case* (pg. 691):

> "We think the rule invoked that recovery should be denied as a matter of law, is plainly inapplicable here, where, as is shown by the testimony of defendant's witnesses, **though the defendant though it necessary to put down the lighted fusee as the train came upon the crossing to stand there,** it did not put the fusee on the side of the train which was struck by the car; and neither is the evidence conclusive that the fusee on the other side of the train was burning at the time of the collision, nor that if it was burning, it would have given sufficient warning to those coming to the crossing from the opposite side."

In the cases at bar, one of the **principal** grounds of negligence relied upon by Appellees was: that the railroad "thought it necessary" (*Church case*) to put fusees on this highway at night at all times, fog or no fog, because of the inherently dangerous nature of the crossing and the type freight cars using it, and had adopted a rule requiring the train crews to do; that motorists had become accustomed to rely upon this warning, just as in the case of blinker lights; that the train crew, in violation of this rule, failed, on the

night of Oct. 25, 1951, to throw out a fusee on the highway, or if it did, the fusee burned out before the 83rd car reached the crossing.

Any finding that Appellees' evidence negatived this principal ground of negligence, is in error.

We expected to prove the existence of this rule conclusively by the train crew. When the crew was not put up we assumed that we would be protected by the *prima facie* statute, as all Georgia decisions hold.

There is not a word in the record to negative the existence of such a railroad rule.

Two of the judges who sat in the *Church case* (*supra*), sat in the cases at bar. **We have read the record in the Church case carefully.**

This Court's decision upsetting the jury's verdict in the cases at bar cannot be reconciled with its decision upholding the verdict in the *Church case* (*supra*).

The only plaintiff in the *Church case* was the representative of the driver of the car. He was drinking; there was liquor in the car. He skidded 120 feet into the train. Nevertheless, this Court (two judges being the same as in the cases *sub judice*) held that the failure of the railroad to put out fusees after recognizing the necessity for them, made a case for the jury.

Now the same Court holds, in the absence of any evidence whatever as to whether or not the driver did, in fact, see the train, that the failure of the railroad to put out fusees is immaterial.

The Court ignores completely the holding in its own Kammerer decision, 239 F. (2d) 115 (footnote pg. 119), that "One is not always required to drive so that he may stop within the range of his headlights," quoting from *Savannah and Atlanta Ry. Co. v. Newsome*, 90 Ga. App. 390, 83 S. E. (2d) 80, and citing *McDowall Transport, Inc., v. Gault*, 80 Ga. App. 445, 447, 56 S. E. (2d) 161.

To the same effect is the 1957 Georgia case of *Padgett v. Central of Ga. Ry. Co.*, 95 Ga. App. 96, 98, 96 S. E. (2d) 659, and others.

In the case of *Doby v. W. L. Florence Const. Co.*, 71 Ga. App. 888, 32 S. E. (2d) 527, the Court said:

> "With respect to the requirement that all motor vehicles must be equipped with lights capable of revealing an object 500 feet ahead, it is common knowledge that substantial objects, because of their composition or coloring, and the coloring of the surface or object upon which they rest, are visible in greatly varying degrees when artificial lights are thrown upon them **and are not necessarily visible.**"

2. Equally incomprehensible is this Court's seemingly contradictory holding that Appellees having "adduced some evidence in support" of their grounds of negligence (the Court just having said that plaintiff's evidence negatived the only ground of negligence upon which they relied), **"the case then stood as to burden of proof no differently from a case against a non-railroad defendant."**

The Court cites no authority for this holding. All Georgia authority is precisely to the contrary. Four cases cited by Appellant itself in its own brief hold precisely to the contrary. We simply cannot understand how this Court could so hold.

One of the cases cited by Appellant is the case of *Collier v. Pollard*, 60 Ga. App. 105, 2 S. E. (2d) 821, which is squarely in point. In that case plaintiff not only proved the injury, but offered some evidence as to the railroad's negligence, as in the cases at bar. The railroad offered no evidence. The trial court granted a nonsuit, holding plaintiff's evidence insufficient and the *prima facie* statute inapplicable, just as this Court has done. But the Court of Appeals reversed, holding that it was incumbent upon the railroad to come forward with its evidence **"as to each of the negligent acts charged in the petition"**.

Other cases cited by Appellant in its own brief which hold precisely contrary to this Court's holding, under similar facts, are:

Fowler v. W. & A. Ry., 75 Ga. App. 156, 42 S. E. (2d) 499. Grant of nonsuit reversed, where plaintiff introduced evidence, but railroad did not. *Prima facie* statute applied.

Gammage v. Atlanta and West Point Ry. Co., 97 Ga. 62, 25 S. E. 207. This is a case decided by the Supreme Court of Georgia in which the plaintiff introduced evidence, but the railroad did not. Grant of nonsuit reversed, because of the *prima facie* statute.

The case of *Gay v. Sylvania Central Ry. Co.*, 79 Ga. App. 362, 53 S. E. (2d) 713, is squarely in point. Plaintiff introduced evidence but the railroad did not. Grant of nonsuit reversed, holding *prima facie* statute applicable.

This Court is rewriting Georgia law in holding that if a plaintiff "particularizes" the grounds of negligence and introduces any "evidence in support thereof", he thereby loses the benefit of the *prima facie* statute.

We point out again that Appellant has not even made any such contention in the cases at bar. All Appellant has contended is that the evidence introduced by Plaintiffs negatived every ground of negligence set out in the complaints, as amended.

But, of course, that is not true, because there was no evidence introduced whatever which negatived one of the principal grounds of negligence relied upon, as set out above.

The Court's decision is, we respectfully submit, precisely contrary to the holding of the Supreme Court in *Erie R. Co. v. Tompkins*, 304 U. S. 64, 58 S. Ct. 817.

3. Under this Court's own decision in the *Church case* (*supra*), failure of a railroad's warning device (fusee) to work makes a case for the jury, even though the driver of the automobile in that case actually saw the train for at least 120 feet before reaching the crossing.

Many other cases to the same effect could be cited. For example, see exhaustive annotation in 5 A. L. R. (2d) 112, **"Customary or statutory signal from train as measure of Railroad's duty as to warning at highway crossing."**

4. Violation of a company rule promulgated for the safety of the public is evidence of negligence. See *Central of Georgia Ry. Co. v. Shaw*, 46 Ga. App. 248, 167 S. E. 533.

5. Appellant may contend that the *ratio decidendi* of the Court's decision is that, (1) regardless of whether or not the railroad customarily protected this particular crossing at night with fusees, (2) regardless of whether or not motorists had become accustomed to be warned by fusees of the presence of a train across the highway, (3) regardless of whether or not fusees were burning at the time of this accident, nevertheless, regardless of all this, the evidence showed that if the driver of the automobile had been exercising ordinary care he could have seen the train in time to stop.

We pointed out in the petition for rehearing that the evidence did show that the train was "plainly visible" to the driver of the car and will not repeat what we said there in this brief.

But neither under the great weight of authority in Georgia nor under this Court's own prior decisions is it necessary to show that the obscuring cause is of such nature as to make visibility of the train absolutely impossible until too late to stop, in order to go to a jury, as this Court now holds.

Proof of some unusual condition is sufficient to go to a jury on the question of whether or not a duty devolved upon the railroad to give some additional warning than that afforded by the train itself, under the circumstances existing.

It is only in clear and absolutely indisputable cases, under Georgia law, that the case is withdrawn from the jury.

Surely this Court cannot hold that the evidence in these cases shows beyond dispute that the driver of the automobile could have seen the **flat, gondola type, freight** car, which he hit, in time to stop before hitting it.

All of the Georgia decisions and the recent decisions of this Court supporting these propositions have been so recently and so thoroughly analyzed by this Court in the *Kammerer case* (*supra*) in which two of the judges who decided the cases at bar took part in the decision, that we consider it unnecessary to elaborate further upon them in this brief.

Since the decision in the Kammerer case, this Court has applied the same principles of law to moving trains. *Texas and Pac. Ry. Co. v. Watkins*, 243 F. (2d) 171.

This Court cites *A. C. L. v. Marshall*, 89 Ga. App. 740, 81 S. E. (2d) 228, as authority for its holding on this point without pointing out as it did in the *Kammerer case* (footnote pg. 119) that the *Marshal case* was not followed by the same court in two subsequent cases arising out of the same accident, namely, *A. C. L. v. Clements*, 92 Ga. App. 451, 88 S. E. (2d) 809, and *A. C. L. v. Coxwell*, 93 Ga. App. 159, 91 S. E. (2d) 135.

As Judge Russell said in the well considered Georgia case of *A. C. L. v. Key*, 196 F. (2d) 64:

> "It is only in a rare case where the evidence demands a finding that the plaintiff was, or in the exercise of due care should have been, aware of the approaching train that further progress in crossing the track may in itself be held a bar to recovery. In all other instances, the question is one for the jury to determine under all the circumstances whether attempt to cross a track without stopping or looking or listening is a failure to observe ordinary care." (Cases cited.)

This Court held three times in the *Kammerer case* (*supra*) that whether or not an object is "plainly visible" to a motorist, when there is evidence of unusual conditions, is for a jury to decide.

It held the same thing in the *Bailey case. Texas-New Mexico Railway Co. v. Bailey*, 203 F. (2d) 647; also *A. C. L. v. Hadlock*, 180 F. (2d) 105; also in the *Pidd case*, 197 F. (2d) 153. Also *Church.* (*supra.*)

The Court in the last Kammerer decision cited with approval and quoted at length from the recent Georgia case of *Savannah and Atlanta Ry. Co. v. Newsome*, 90 Ga. App. 390, 83 S. E. (2d) 80, at page 83; which cites many of the other Georgia cases holding to the same effect. (Headnote pg. 119).

See extensive annotation in 42 A. L. R. (2d) page 13, Sections 18 and 49, *entitled "Liability for Motor Vehicle Accident Where Vision of Driver is Obscured By Smoke,*

Dust, Atmospheric Condition or Unclear Windshield" in which the leading Georgia cases are discussed.

As a close student of this Court's decisions in railroad crossing cases since the advent of the automobile era, and having read the records in many of these cases, the writer asserts that this Court has never before held, during this period, that a case such as this is not a case for a jury.

DIVISION II

Feeling certain that all three of these cases would have to be affirmed under Ga. Code Sections 94-1108 and 38-119 and under the principals of law so recently announced by this Court in the cases of *Kammerer, Watkins, Church, Bailey, Pidd* (all *supra*), and many others, we failed, in our brief, to call the Court's attention to the fact that under the facts involved here, two of the cases at bar, to wit, *Tyre v. A. C. L. and Sapp v. A. C. L.*, stand in a much more favorable position under the law of Georgia than does the third, *Beckham v. A. C. L.*

The Tyre boy and the Sapp boy were guest passengers in the Beckham car, the Beckham boy being the driver of the car, all as shown by the record.

We most earnestly contend that under this Court's own findings and holdings on these appeals, the verdicts in favor of Mrs. Tyre and in favor of Mrs. Sapp must be sustained, ever though the verdict in favor of Mrs. Beckham be reversed upon the following grounds, to wit:

1. This Court has held on these appeals that the evidence showed that the fog was not thick enough to prevent the driver of the car (Beckham) from seeing the freight train and that he was, therefore, negligent in not bringing his car to a stop before reaching the crossing.

2. This Court has also held on these appeals that the *prima facie* statute (Ga. Code 94-1108) is not applicable in any of the three cases because the plaintiffs "particularized" the railroad's acts of negligence and **adduced some evidence in support thereof.**" (Op. pg. 8).

3. It is elementary, of course, that the negligence of the driver of an automobile is not attributable to his guest

passengers. *Atlantic Greyhound Corp. v. Loudermilk*, 110 F. (2d) 596 (5).

4. There was no evidence of any independent negligence on the part of the guests, Tyre and Sapp.

5. This Court has therefore held, in effect, that the death of young Tyre and Sapp was the result of the joint and concurrent negligence of Beckham, the driver of the automobile, and the defendant, Atlantic Coast Line Railroad Company.

6. Nevertheless, this Court has reversed the judgment against one of these two joint tort feasors in favor of the mothers of the two guest passengers, even though the Court has heretofore held, in accordance with the great weight of authority in all jurisdictions, that full recovery may be had against one joint feasor, no matter how small the negligence of the sued joint feasor may have been when compared with the negligence of the unsued joint tort feasor; credit being given for any payments made by the unsued joint tort feasor, as was done in these cases. (See Charge of Court, Record page 57.)

The following is the holding of this Court in the case of *A. C. L. v. Freeman*, 193 F. (2d) 217 at page 219:

> **"Even if the collision was caused by the concurring negligence of the defendant and of the driver of the car, the defendant is liable for injuries to a non-negligent guest in the car to the same extent as though the damage had been caused by defendant's negligence alone. It is no defense for a wrongdoer that a third party shared the guilt of the same wrongful act, nor can such wrongdoer escape liability for damage he has caused on the ground that the wrongful act of a third party contributed to the injury."**

7. There is still another important point which differentiates the *Tyre* and *Sapp cases* from the *Beckham case*. Each of these three cases was filed separately. The Court below required them to be tried together, however, because they arose out of the same accident, even though different legal principles were involved in the guest cases than in the driver's case. But separate evidence was introduced as to

each case and the Court charged the jury separately as to each case, all as shown by the record.

This Court has held that all of these plaintiffs lost the benefit of the prima facie statute because evidence was introduced to exonerate the driver of the car of negligence in one of the cases.

We respectfully submit that Appellees, Mrs. Tyre and Mrs. Sapp, should not be penalized because by order of the trial court the cases were consolidated for the purpose of trial. If the cases of Mrs. Tyre and Mrs. Sapp had been tried separately from that of Mrs. Becton, all that would have been done would have been to prove the death of their sons as the result of the collision with the freight train. The railroad, under this Court's decision, would then have been compelled to produce the evidence of the train crew, which we are confident would have made out a case of negligence against the railroad.

Surely, as to the cases of Mrs. Tyre and Mrs. Sapp, the prima facie statute was not rendered inapplicable because evidence was introduced to show, in support of the Becton case, (1) that the car was in good condition, (2) that the driver could not see the train because of the fog, and (3) that the railroad failed to warn him of the train's presence at the crossing.

As to the Tyre and Sapp cases, the only evidence introduced was with respect to the death of the two boys as the result of the collision with the train, the value of their lives and dependency.

As to them, the railroad was certainly required to put up the train crew as witnesses under the prima facie statute and its failure to do so, we respectfully contend, demands that the judgments in their favor be affirmed.

IN CONCLUSION

The Court will pardon this personal reference. One of the authors of this brief had the rare good fortune, as a law student thirty-five years ago, to have as his tutor, the late lamented Sir William Holdsworth of Oxford University, noted English jurist, author and professor of law. His

constant admonition to his pupils was "follow the argument wherever it leads" when judges hold against you upon grounds unfathomable to you.

We have tried to do that in these cases, but the mystery remains.

The most that can be said is that Appellees' attorneys failed to anticipate this Court's novel holding with respect to the Georgia *prima facie* statute and therefore failed to put in the testimony of the train crew with respect to the railroad's rule about putting out fusees.

There can be no question about the fact that the ruling is novel.

We respectfully submit that these cases should be affirmed, but that in any event, the most this Court should do is to send them back for a new trial under this new Georgia law promulgated by this Court.

Respectfully submitted,

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ORDER DENYING REHEARING

Extract from the Minutes of December 24, 1957

ATLANTIC COAST LINE RAILROAD COMPANY,

No. 16425 *versus*

MRS. WOODROW SAPP, MRS. JAMES H. TYRE, and MRS. LEROY BECKHAM, SR.

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.